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In The
Supreme Court of the United States

October Term 1998

ADMINISTRATIVE COMMITTEE, WAL-MART STORES, INC. ASSOCIATES HEALTH AND WELFARE PLAN,
Petitioner,

v.

KIMBERLY SPECIALE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. There Is A Significant Split In The Circuits On The Reimbursement Issue Presented

In her Brief in Opposition, Respondent Kimberly Speciale ("Speciale") seeks to avoid this Court's review by claiming there is no split in the circuits because the issue of removal jurisdiction was not specifically discussed in all of the circuit and district court decisions cited in the Petition for Writ of Certiorari filed by the Wal-Mart Stores, Inc. Associates Health and Welfare Plan ("Plan" or "Petitioner"). Of the cases cited by the Plan which conflict with the Seventh Circuit's decision below, *Marshall v. Employers Health Ins. Co.* Nos. 96-6063, 96-6112, 1997 WL 809997 (6th Cir., Dec 30, 1997), *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995), *Engle v. Wal-Mart Associates Health & Welfare Plan*, No. 2:97-CV-317-TS (N.D. Ind. Jan 14, 1998), *Cortez v. Michael Reese Health Plan, Inc.* 980 F.Supp. 277 (N.D. Ill. 1997), *Crump v. Wal-Mart Group Health Plan*, 925 F.Supp. 1214 (W.D. Ky. 1996), and *McGee v. Humbrecht*, Nos. 91-2668, 91-2722 (E.D. La. Sept. 26, 1991) involve express rulings on the removal issue. The remainder of the conflicting cases cited by the Plan, including *Wright v. Aetna Life Ins. Co.*, 110 F.3d 762 (11th Cir. 1997), *Ryan v. Federal Express Corp.*, 78 F.3d 123 (3rd Cir. 1996), *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293 (7th Cir. 1993), and *Harkenbower v. Dent*, 963 F.Supp. 712 (N.D. Ill. 1997) assume without significant discussion that federal court jurisdiction upon removal was proper.

Speciale contends that the lack of substantive discussion means that the latter line of cases cited above does not reflect additional conflict in the circuits. What Speciale forgets is that federal courts are not courts of general jurisdiction and that they have a duty to determine

whether jurisdiction exists even if the parties are prepared to concede it. *Steel v. Citizens for a Better Environment*, ___ U.S. ____, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). This is particularly true of the three federal appellate courts in *Wright*, *Ryan* and *Cutting* which assumed, like most others, that federal question of jurisdiction existed where a state court plaintiff filed a claim against a benefit plan to reduce or avoid reimbursement to the plan (i.e., retain benefits). As this Court recently held in *Steel Co.*:

> Every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties were prepared to concede it. [Citations omitted]. 'And if the record discloses that the lower court was without jurisdiction, this court will notice the defect, although the parties make no contention concerning it.'

Steel v. Citizens for a Better Environment, 1998 U.S. LEXIS 1601, at *21. Thus, implicit in *Wright, Ryan* and *Cutting* are holdings that those appellate courts had federal question removal jurisdiction under ERISA, just as Petitioner maintains should have been recognized in the instant case by the court below. As such, five federal appellate courts and at least five federal district courts differ with the court below and would uphold the Plan's removal and the District Court's decision below. This reflects significant dissension among the federal courts, warranting review by this Court.

II. Speciale's Conflict Preemption Analysis Does Not Apply.

Confusing complete preemption analysis with conflict preemption, Speciale contends that *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L.Ed.2d 695 (1995), precludes preemption in this case. As the Seventh Circuit itself has noted in *Rice v. Panchal*, "conflict preemption" under § 514(a) of ERISA is a separate and independent issue from "complete preemption" under § 502(a) of ERISA. *Rice v. Panchal*, 65 F.3d at 639. Conflict preemption arises only as a defense to a state law action. Conflict preemption can never give rise to federal court jurisdiction upon removal from state court. *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 145, 111 S.Ct. 478, 486, 112 L.Ed.2d 474 (1990). Complete preemption, on the other hand, is an exception to the well-pleaded complaint rule allowing federal court removal jurisdiction for claims within the scope of § 502(a)(1)(B) of ERISA. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64, 66, 107 S.Ct. 1542, 1546-48, 95 L.Ed.2d 55, (1987). Petitioner has never taken the position that conflict preemption applies to this case. Speciale's Petition to Adjudicate filed against the Plan in state court is a civil action seeking to recover benefits claimed by the Plan (by retaining them) and/or to enforce rights under the terms of the Plan through "common fund" and "make whole" relief. Indeed, this is the very relief claimed by Speciale in the District Court below. Regardless of how it is couched, the Petition to Adjudicate is completely preempted by ERISA and recast as a claim under § 502(a)(1)(B) of ERISA for the same relief.

Further, even applying the *New York State Conference* decision, it is clear this Court has not departed from its recognition of the importance of uniformity in the

area of reimbursement requirements under ERISA. Indeed, in *New York State Conference*, this Court reaffirmed its adherence to *FMC Corp. v. Holliday*, as follows:

> Similarly, Pennsylvania's law that prohibited 'plans from ... requiring reimbursement [from the beneficiary] in the event of recovery from a third party' related to employee benefit plans within the meaning of § 514(a). *FMC Corp v. Holliday*, 498 U.S. 52, 60, 112 L.Ed.2d 356, 111 S. Ct. 403 (1990). The law 'prohibited plans from being structured in a manner requiring reimbursement in the event of recovery from a third-party' and 'required plan providers to calculate benefit levels in Pennsylvania based on expected liability conditions that differ from those in states that have not enacted similar anti-subrogation legislation,' thereby 'frustrating plan administrator's continuing obligation to calculate uniform benefit levels nationwide.' *Ibid.* Pennsylvania employees who recovered in negligence actions against tortfeasors would, by virtue of the state law, in effect have been entitled to benefits of excess of what plan administrators intended to provide, and in excess of what the plan provided to employees in other States.

New York State Conference, 514 U.S. at 657-58. Had Speciale sued under a state anti-subrogation provision, such claim would be preempted under conflict preemption and would have been met by a motion to dismiss from the Plan. Instead, Speciale filed a generic request for the state court to adjudicate her obligations for repayment of benefits to

the Plan. The Petition to Adjudicate is completely preempted, and removal was proper.

III. Speciale's Brief Admits Of The Need For Removal

Speciale urges the use of fiction to convert this ERISA case back into the tort case from which it arose. It is uncontroverted that the underlying tort case filed by Speciale had settled and that she then filed a Petition to Adjudicate the settlement funds. Rather than acknowledge the fiction, Speciale argues in her Brief in Opposition at 6, the holding in the opinion below:

> Not even the most expansive reading of ERISA covers motor vehicle collisions, just because part of the recovery may inure to the benefit of the plan.

Continuing to ignore the fact that the tort case has long been settled, Speciale continues the fiction in her Brief in Opposition, at 6, as follows:

> The process of lien adjudication in state court cases may affect a plan and its recovery in any specific case, but such exercises of ancillary jurisdiction affect all lienholders in a case. These motions do not interpret the plan documents or declare ERISA rights.... No substantive reference to the plan documents is required .... To 'recharacterize' the motion as a declaratory judgment for rights under the plan changes the underlying judicial task from allocation to interpretation.

This is a distinction without a difference. Allocation of settlement proceeds to a self-funded ERISA plan *ipso facto* requires interpretation and application of the Plan as a matter of federal law. *See, e.g., Ryan v. Federal* Express, 78 F.2d at 127-28 (citing *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 474 U.S. 865, 106 S. Ct. 183, 88 L.Ed.2d 152 (1985), and *Craig v. Bemis Co.*, 517 F.2d 677, 684 (5th Cir. 1975) for the requirement of following the terms of the benefit plan in determining reimbursement). The purported distinction raised by Speciale also points to the motive behind the filing of such state law petitions to adjudicate as a way to ignore and defeat the legitimate interests of ERISA benefit plans. In effect, what Speciale admits in her Brief in Opposition is that she was trying to use the state court to adjudicate her obligations to the Plan without looking at or giving effect to the Plan documents at all. To allocate settlement funds, over which the Plan has an express reimbursement right, necessarily requires interpretation of the Plan documents.

There can be no question that the Petition to Adjudicate Speciale's benefit repayment obligations has the effect of a declaratory judgment to determine how much Speciale owes the Plan in reimbursement. Such claim must be recast as a civil action to recover benefits and/or enforce rights under the terms of the Plan. If Speciale is allowed to ignore the necessary impact and effect of the Petition to Adjudicate, then she is allowed to redraft the provisions of the Plan documents through artful pleading which attempts to ignore the Plan while at the same time adjudicating the Plan's interests. To allow the decision below to stand would continue a significant split in the circuits and frustrate the law and spirit of ERISA, particularly where a national, self-funded benefit plan is at issue.

IV. Speciale's Brief Misstates The Facts And Law Regarding The Effect Of A Reversal By This Court.

Speciale's Brief in Opposition claims that the District Court's decision below would have granted the Plan greater rights than Speciale had to the proceeds of the recovery. Confusing subrogation and reimbursement, Speciale argues that "participants cannot give more to the Plan than they have and cannot assign to the Plan rights to recover greater than those granted under state law." Brief in Opposition at 8. These claims are erroneous for several reasons. First, Speciale confuses reimbursement with subrogation. As stated by the Seventh Circuit:

> Unlike subrogation, which arises under state law and allows the insurer to stand in the shoes of its insured, reimbursement is a contractual right governed by ERISA and comes into play only after a plan member has received personal injury compensation.

Unisys Medical Plan v. Timm, 98 F.3d 971, 973 (7th Cir. 1976). Subrogation allows an insurer to stand in the shoes of the injured person and to litigate a claim for the injured person against the at-fault party. To the extent the insurer makes a recovery over and above the subrogation interest, that money is paid to the injured party. Reimbursement arises only after the plaintiff has received a settlement of claims. *Id.*

Speciale sued the at-fault party, which suit resulted in a settlement. Only after the lawsuit was pursued and settled by way of a monetary recovery, was the Plan involved. This involvement can only be reimbursement, a contractual right governed by ERISA. The Plan did not stand in the shoes of Speciale; she stood in them herself and

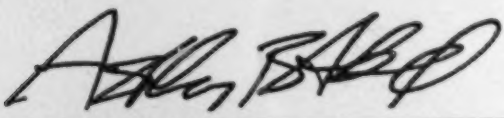
sued the tortfeasor. Reversal of the court below would allow a federal court to review the amount and nature of the settlement under the terms of the Plan and make a determination of Speciale's obligation to repay benefits to the Plan. This is precisely what the District Court did prior to being reversed by the court below. Because the interest at issue is reimbursement, the claim of creating greater rights through subrogation has no merit and, beyond that, is not involved in this case at all.

CONCLUSION

If the Seventh Circuit decision below is allowed to stand, state law Petitions to Adjudicate will ignore and defeat express reimbursement language in ERISA self-funded plans. Speciale's Brief ignores the wide disparity of views on this important jurisdictional issue in the federal system and admits of the basis for complete preemption. The Petition for Certiorari should be granted and the Seventh Circuit decision below reversed.

Dated: November 19, 1998
Greenville, South Carolina

Respectfully submitted,



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